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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re A.P. et al., Minors Coming Under the
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.B.,

Defendant and Appellant.

F057056

(Super. Ct. No. 02CEJ300258)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Jane Cardoza,
Judge.

Mario de Solenni, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kevin Briggs, Interim County Counsel, and William G. Smith, Deputy County
Counsel, for Plaintiff and Respondent.

* Before Vartabedian, Acting P.J., Cornell, J. and Hill, J.

J.B. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26)¹ to her two youngest children, two-year-old A. and one-year-old C. She contends the juvenile court and the Fresno County Department of Children and Family Services (the department) failed to address at the section 366.26 hearing whether A. and C. should have been placed with their other siblings for permanency planning purposes. She also argues the juvenile court erroneously declared the other children were not A. and C.'s siblings, thereby preventing her from asserting termination would interfere with their sibling relationship. On review, we affirm.

PROCEDURAL AND FACTUAL HISTORY

When C. was two months old, he was hospitalized and diagnosed with failure to thrive. He weighed only six pounds and was malnourished. His blood sugar was so low it did not even register. Mother had not sought medical attention for C. following his at-home birth. She admittedly was abusing drugs and had been throughout her pregnancy with C., despite having previously received court-ordered services between 2002 and 2004. Mother also had many other minor-aged children, including one-year-old A. All of the children were at risk of serious physical harm due to mother's serious involvement with drugs. The children were unsupervised and lived in an unsanitary and unsafe environment.

These facts led the department to detain mother's children and initiate the underlying dependency proceedings. Mother thereafter waived her rights and admitted to the Fresno County Superior Court's exercise of dependency jurisdiction over the children (§ 300, subd. (b)).

¹All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

In April 2008, the juvenile court adjudged all of the children dependents and removed them parental custody. Although the juvenile court had authorized relative placement in addition to foster care placement for the children, the only relative to come forward could not qualify. Mother's two eldest minor children were placed together in one foster home. The next four children in age, including A., were placed in another foster home. C., who suffered global developmental delays and several physical problems, was placed in a special needs foster home once he was released from the hospital. The case plan for all of the children called for a department social worker to arrange weekly sibling visitation.

At the same April 2008 hearing, the juvenile court denied mother reunification services due to the severe physical harm she had inflicted upon C. (§ 361.5, subd. (b)(6)) and because she had resisted previous court-ordered treatment for her substance abuse problem (§ 361.5, subd. (b)(13)). It, however, granted services to the presumed fathers of A. and C.'s siblings. At the time it was alleged that one of those men was the father of A. and C. Mother did not appeal the April 2008 dispositional order.

During the summer of 2008, DNA test results excluded A. and C.'s alleged father as their biological father. Mother had no suggestions as to who their father might be. Because mother was not receiving services and no father could be identified for A. and C., the juvenile court in September 2008 ordered the setting of a section 366.26 hearing to select and implement permanent plans for A. and C. Reunification services meanwhile were ongoing for the fathers of A. and C.'s siblings; those fathers were making moderate progress in their respective plans. Mother did not challenge the juvenile court's setting order.

The department submitted a "366.26 WIC Report" in January 2009 in which it recommended that the juvenile court find both A. and C. likely to be adopted and order termination of parental rights. Although each child suffered delays, their respective foster parents were committed to adoption and were identified as prospective adoptive

parents for A. and C. A. continued to live in her foster home with three of her older half siblings, while C. continued to live in the same special needs home. Since the juvenile court set the section 366.26 hearing, mother missed approximately 10 out of 12 scheduled visits with A. and C. and offered no explanation for her absence. There is no dispute on appeal that A. and C. are likely to be adopted.

The juvenile court conducted the section 366.26 hearing in February 2009. County counsel, on behalf of the department, relied on its earlier report recommending termination.

Mother's counsel called the case manager for A. and C. He had been assigned to A. and C.'s case since the end of October 2008.

The case manager appeared at some of the children's visits with one another. He had seen some friendly interaction between the children but at times there did not appear to be any interaction between them because they did different things. He did not see any fighting and they appeared to be like any other group of kids.

Since the time he wrote the "366.26 WIC Report" the case manager learned that in December 2008 a maternal great-aunt and great-uncle (maternal relatives) had been approved for placement of two children. He understood these maternal relatives were interested in taking all of the children. The department, however, would not consider placing A. and C. with the maternal relatives. They came forth so close to the section 366.26 hearing and had no significant, if any, relationship with A. and C.

In the case manager's opinion, the children's friendly sibling relationship did not outweigh the benefit of adoption. A. and C. were young, they did not have frequent contact, and their relationship with the other children was not significant.

Mother testified that the maternal relatives were interested in taking all the children but the fathers of her other children "wanted to get them." When mother's attorney asked additional questions about the maternal relatives, the juvenile court sustained relevance objections. The juvenile court eventually advised counsel placement

was not an issue at a section 366.26 hearing and encouraged counsel to review the issues that were relevant.

In turn, mother testified she had observed all the children at visits playing together. She described A. approaching C. to hug and kiss him and give him whatever she was eating. They would play with each other.

In closing argument, mother's counsel argued the sibling relationship was important and should not be disregarded. Based on the sibling relationship and the maternal relatives' interest in keeping the family together, counsel urged the juvenile court to place A. and C. in a guardianship with the maternal relatives.

DISCUSSION

Mother contends the juvenile court and the department failed to address at the section 366.26 hearing whether A. and C. should have been placed with their other siblings for permanency planning purposes. Indeed, according to mother, the juvenile court erroneously declared the other children were not A. and C.'s siblings. With this as her premise, mother infers the juvenile court prevented her from arguing termination would be detrimental to A. and C. based on a theory that it would interfere substantially with a significant sibling relationship (§ 366.26, subd. (c)(1)(B)(v)).² Upon our review of the record and the relevant law, we disagree with each of mother's claims.

²This provision states that termination would be detrimental to an adoptable child if there would be substantial interference with a child's sibling relationship,

“taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (§ 366.26, subd. (c)(1)(B)(v).)

A.

As the juvenile court correctly observed, placement is not an issue to be litigated at a section 366.26 hearing to select and implement a permanent plan for a dependent child. At issue, rather, is whether there is clear and convincing evidence the child is likely to be adopted. (§ 366.26, subd. (c)(1).) If so, the juvenile court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances in section 366.26, subdivision (c)(1) provides a compelling reason for finding that termination of parental rights would be detrimental to the child. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

Mother offers no authority to the contrary. At most, in her reply brief, she argues placement is an issue because parental rights should not be terminated if all the siblings should be adopted together and a home for all of them is unavailable. She cites to section 366.26, subdivision (c)(3).

Points raised for the first time in a reply brief will not be considered unless there is a good cause showing for failure to present them earlier. (*Monk v. Ehret* (1923) 192 Cal. 186, 190.) Here, mother offers no good cause excuse.

In any event, section 366.26, subdivision (c)(3) does not support her claim. Section 366.26, subdivision (c)(3) refers to a situation in which termination of parental rights would not be detrimental to a child who has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent. This was not the situation in either A. or C.'s case. Each child was in a placement with available prospective adoptive parents.

To the extent mother assumes A. and C. should have been placed with the maternal relatives whom the department approved for placement in December 2008 and therefore placement was properly at issue at the subsequent section 366.26 hearing, she overlooks the law in this regard.

A juvenile court properly may refuse to consider a new relative placement request at a section 366.26 hearing. (§ 361.3, subd. (d).) Once a child has been removed from parental custody, the juvenile court shall reconsider relative placement “whenever a new placement of the child must be made.” (§ 361.3, subd. (d).) It is only when a child’s placement needs to be changed, regardless of a relative-placement request, that the juvenile court should once again consider relatives. (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1328.) This approach acknowledges the child’s need for a stable placement. (*Ibid.*)

Mother could have filed a section 388 petition requesting that the juvenile court consider placing the two youngest children with the maternal relatives once they were approved for placement. Section 388 exists as a means of changing or setting aside any order of the juvenile court in the action from the time the child is made a dependent child of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Had she made the requisite prima facie showing for relief (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415), the juvenile court could have considered the issue prior to or in conjunction with the section 366.26 hearing.

She did not pursue, however, this procedural option. That being said, we are not surprised she refrained from petitioning under section 388. There was no independent need to change the children’s placement at this late stage (§ 361.3, subd. (d)) and there was an apparent lack of any evidence that moving the children from their stable adoptive placements to the maternal relatives’ home would serve A. and C.’s best interests.

Because placement was not at issue at this termination hearing, we conclude mother’s claim -- that the juvenile court and the department should have addressed at that hearing whether A. and C. should have been placed with their other siblings -- is meritless.

B.

Mother's claims that the juvenile court declared her other children were not A. and C.'s siblings and somehow prevented her from raising the sibling relationship exception to termination are unpersuasive. Her argument ignores the record that refutes both of these claims.

First, the juvenile court made no such declaration. The juvenile court properly sustained a relevance objection to a question posed by mother's counsel to mother. That question was:

"What was your understanding of what they would want for -- regarding placement if the other children's fathers couldn't have them?"

Mother's counsel retorted, "this is regarding the sibling group," to which the juvenile court replied: "at this point the sibling group is [A.] and [C.]" While mother claims the juvenile court's statement amounts to a determination that the other children were not A. and C.'s siblings, that is not what the juvenile court said.

Mother also overlooks the record, which demonstrates once her attorney moved on to specific questions about the sibling relationship, the juvenile court determined such questioning was relevant and overruled an objection otherwise. Such questions notably referred to "all the children," "all your children," and A. and C. "with your other children." The juvenile court did not in any way prevent mother from introducing evidence about her children's relationships within one another.

C.

One final note. Underlying mother's appeal is the notion that, through its placement decisions, the juvenile court or the department somehow failed to preserve and strengthen A. and C.'s sibling ties. Mother's insinuation again ignores the record, as well as the reality of her children's circumstances. C.'s profound medical and developmental problems have required his placement, since his hospital release, in a special needs foster home. Meanwhile, a single foster home apparently was not available for all of mother's

remaining minor-aged children, including A. A. and three of her older half siblings, however, were placed together in a foster home and have remained together ever since. The case plan for all of the children included weekly visits. If mother believed something more should have been done, she failed to raise it either in the juvenile court or by way of an earlier appeal or writ proceeding.

DISPOSITION

The order terminating parental rights is affirmed.